

87-693

No.

Supreme Court, U.S.
FILED

OCT 29 1987

JOSEPH E. SPANIEL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM B. OWEN
SPECIALIST FOUR, UNITED STATES ARMY,
PETITIONER,

v.

THE UNITED STATES OF AMERICA,
RESPONDENT.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF MILITARY APPEALS**

JOHN T. EDWARDS
*Colonel, Judge Advocate
General's Corps (JAGC)
United States Army
5811 Columbia Pike
Falls Church, Virginia 22041
(202) 756-1807*

Counsel of Record

and

JOEL D. MILLER
*Lieutenant Colonel, JAGC
United States Army*

DONALD G. CURRY, JR.
*Captain, JAGC
United States Army*

SCOTT A. HANCOCK
*Captain, JAGC
United States Army*

JOHN J. RYAN
*Captain, JAGC
United States Army*



QUESTIONS PRESENTED

I.

Whether the Petitioner's Fifth and Sixth Amendment Rights to present a defense were violated by the Court's holding that it lacked the discretion to order a psychiatric evaluation.

II.

Whether Petitioner's Fifth Amendment right to due process and Sixth Amendment right to confrontation were violated by the military judge's exclusion of extrinsic evidence of the victim's past false accusations.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Constitutional Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	4
I PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS TO PRESENT A DEFENSE WERE VIOLATED BY THE COURT'S HOLDING THAT IT LACKED THE DISCRETION TO ORDER A PSYCHIATRIC EVALUATION	4
II. PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS AND SIXTH AMENDMENT RIGHT TO CONFRONTATION WERE VIOLATED BY THE MILITARY JUDGE'S EXCLUSION OF EXTRINSIC EVIDENCE OF THE VICTIM'S PAST FALSE ACCUSATIONS	6
Conclusion	10
Appendix A	1a
Appendix B	11a

TABLE OF AUTHORITIES

Cases:

<i>Davis v. Alaska</i> , 415 U.S. 308 (1974)	7, 8
<i>Dinkins v. State</i> , 244 So.2d 148 (Fla. 1971)	4
<i>Virgin Islands v. Scuito</i> , 623 F.2d 869 (3rd Cir. 1980)	4
<i>State v. Clusey</i> , 446 P.2d 116 (Ore. 1968)	5
<i>State v. Schweitzer</i> , 171 N.W.2d 737 (S.D. 1969) .	5
<i>United States v. Abel</i> , 469 U.S. 45 (1984)	8
<i>United States v. Banker</i> , 15 M.J. 207 (CMA 1983)	7

IV

Cases—Continued;	Page
<i>United States v. Benn</i> , 476 F.2d 1127 (D.C. Cir. 1973)	4
<i>United States v. Dorsey</i> , 16 M.J. 1 (CMA 1983) ..	8
<i>United States v. Hunter</i> , 21 M.J. 240 (CMA 1986)	8, 9
<i>United States v. Owen</i> , 24 M.J. 390 (CMA 1987)	1, 4, 5, 9
<i>United States v. Riley</i> , 657 F.2d 1377 (8th Cir. 1981)	4
<i>United States v. Russo</i> , 442 F.2d 498 (2d Cir.), cert. denied, 404 U.S. 1023 (1972)	4
Constitution:	
U.S. Constitution	1
Amend. V.	1
Amend. VI	2
Miscellaneous:	
Army Regulations	
Army Reg. 635-200, Enlisted Personnel—Separations, Chaps. 13-15 (5 July 1984) ...	5
Military Rules of Evidence	
Mil. R. Evid. 403	9
Mil. R. Evid. 404(b)	7
Mil. R. Evid. 412	8
Mil. R. Evid. 608(a)	6
Mil. R. Evid. 608(c)	6
Annotation, "Requiring Complaining Witness in Prosecution for Sex Crime to Submit to Psychiatric Examination," 18 A.L.R.3d 1433 (1968)	4
3 A Wigmore, Evidence § 940 (Chadbourn rev. 1970)	7

In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

WILLIAM B. OWEN
SPECIALIST FOUR, UNITED STATES ARMY
PETITIONER,

v.

THE UNITED STATES OF AMERICA
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, William B. Owen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at 24 M.J. 390 (CMA 1987) (Appendix A). The opinion of the Army Court of Military Review is unreported, CM 446261, (ACMR 1985) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 31, 1987, affirming petitioner's conviction dated July 24, 1984. The jurisdiction of the Court is invoked under 28 U.S.C. § 1259(3) (Supp. II 1984).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

Amendment V: "No person shall . . . be deprived of liberty or property without due process of law." Amendment

- VI: "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him."

STATEMENT OF THE CASE

Petitioner and Private First Class (PFC) Molly Petersen were stationed together at Fort Bliss, Texas. On 9 October 1983, the two made arrangements to spend some time together (R. 89). Petitioner was concerned about PFC Petersen because she had been involved in a sexual relationship with Specialist Four (SP4) Kilgore, another friend of petitioner's (R. 187). The relationship was ending abruptly because SP4 Kilgore was leaving military service (R. 171). Petitioner and PFC Petersen drove in the petitioner's automobile to McKelligon Canyon, where they talked for approximately 20 minutes (R. 89). Next, petitioner kissed PFC Petersen. According to petitioner, PFC Petersen refused his advances, and he desisted (R. 177). According to PFC Petersen, petitioner did not cease forcing unwanted attentions upon her. He ripped open her blouse and sucked on her breasts, then pushed her out of the automobile and performed forcible sodomy upon her (R. 89, 90). Petitioner was subsequently convicted of the commission of an indecent assault and forcible sodomy.¹

Petitioner moved to have the alleged victim submit to a psychiatric examination based upon her "extensive anti-social and unusual behavior patterns" (R. 40-52, App. Ex. XI). Prior to the incident in issue the alleged victim made several fraternization charges against higher ranking individuals which had proven to be unfounded. The first fraternization charge, which was made by the victim against a Captain (CPT) Lederle, was dropped after completion of a formal investigation (R. 41). In the second charge she alleged that First

¹ Contrary to his pleas, petitioner was found guilty of indecent assault and forcible sodomy in violation of Articles 134 and 125 of the Uniform Code of Military Justice [hereinafter cited as UCMJ] 10 U.S.C. §§ 934 and 925 (1982), respectively. He was sentenced to a bad-conduct discharge, and reduction to the lowest enlisted grade. The sentence was approved by the convening authority pursuant to Article 60, UCMJ.

Sergeant Higgins, her senior supervising sergeant, had tried to fraternize with her, but then retracted this allegation when he immediately confronted her (R. 41). The defense counsel offered that PFC Petersen had also reported to the military police that a black male who had been following her tried to pick her up and had threatened her when she refused to enter his automobile (R. 42, 43). The defense counsel alleged that "anybody who accosts, talks to, makes a pass at, or whatever does to this particular female becomes a federal case" (R. 43). The defense counsel alleged that all of the allegations were unfounded, and that the alleged victim was a liar (R. 43-44). All of the incidents occurred within two or three months of each other (R. 47). The military judge questioned his own authority to order a psychiatric examination, and noted that in jurisdictions where such an examination was permitted, the state had passed legislation authorizing it (R. 50). The military judge then denied the motion (R. 52).

The defense counsel also desired to call CPT Lederle as a witness to show that PFC Petersen had made similar unfounded accusations against him. The military judge denied this request, allowing only cross-examination of PFC Petersen on the point of her relationship with CPT Lederle (R. 58-60). The military judge also refused to allow any mention of the military police report which PFC Petersen had made concerning her being threatened and followed by an unknown male (R. 60). During trial on the merits, on cross-examination, PFC Petersen stated that Captain Lederle had asked her and the other members of the volleyball team out for ice cream, but that when she arrived, only he was there. They drove out on Transmountain Road, and he made sexual advances which she rebuffed. PFC Petersen denied making any charges of sexual harassment against First Sergeant Higgins (R. 99).

The issues granted by the Court of Military Appeals, as a prerequisite to this Court's jurisdiction, were as follows:

WHETHER THE MILITARY JUDGED ERRED BY
EXCLUDING EXTRINSIC EVIDENCE OF THE VIC-
TIM'S PAST FALSE ACCUSATIONS?

WHETHER THE COURT ERRED IN HOLDING IT LACKED DISCRETION TO ORDER A PSYCHIATRIC EXAMINATION OF THE ALLEGED VICTIM?

The Court of Military Appeals found that the evidence in issue was properly excluded and that evidence of record did not support requiring the victim to undergo a psychiatric examination. *United States v. Owen*, 24 M.J. 390 (CMA 1987).

REASONS FOR GRANTING THE WRIT

I

PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS TO PRESENT A DEFENSE WERE VIOLATED BY THE COURT'S HOLDING THAT IT LACKED THE DISCRETION TO ORDER A PSYCHIATRIC EVALUATION.

While there is a decided split in authority, some jurisdictions support the view that a court possesses the inherent discretionary power to compel the psychiatric examination of the sexual assault victim. See *United States v. Riley*, 657 F.2d 1377 (8th Cir. 1981); *Virgin Islands v. Scuito*, 623 F.2d 869 (3rd Cir. 1980); *United States v. Benn*, 476 F.2d 1127 (D.C. Cir. 1973); *United States v. Russo*, 442 F.2d 498 (2d Cir.), cert. denied, 404 U.S. 1023 (1972); See also Annotation, "Requiring Complaining Witness in Prosecution for Sex Crime to Submit to Psychiatric Examination," 18 A.L.R.3d 1433 (1968). In *United States v. Owen*, 24 M.J. at 396, Chief Judge Everett in a concurring opinion stated that military judges do have inherent authority to direct psychiatric examinations of alleged victims. In writing for the court Judge Cox, while ruling that military judges do not have such inherent authority, held that the military judge has "leverage" to compel a psychiatric evaluation. He indicated that the results reached by him and Chief Judge Everett are identical and that they only disagree as to the label to be given the power. *United States v. Owen*, 24 M.J. at 396 n.6. Among those jurisdictions which recognize the inherent power to compel examinations, the examinations are reserved to cases where it is necessary to uphold due process of law. *Dinkins v. State*, 244 So.2d 148

(Fla. 1971). This standard has been phrased in terms of "compelling reasons," *State v. Clasey*, 446 P.2d 116, 117 (Ore. 1968) or "substantial showing of need and justification." *State v. Schweitzer*, 171 N.W. 2d 737 (S.D. 1969).

In this case the alleged victim had a history of making unsubstantiated charges against other soldiers. She accused her First Sergeant of fraternization, a charge she retracted when confronted, and accused CPT Lederle of making sexual advances towards her. Although an investigation was initiated, this charge was also unsubstantiated. In the same time frame she also accused an unknown black soldier of making verbal sexual comments and threats to her. Once again no charges were filed as the petitioner was unable to identify or describe the so-called perpetrator other than the fact that he was a black male soldier. Petitioner was even counselled by her First Sergeant concerning making false accusations against her fellow soldiers (R. 153, 155).

The alleged victim had a propensity to either make false charges against innocent soldiers or to grossly exaggerate what had transpired between herself and other soldiers. An accused has little recourse against a witness who fabricates, particularly if the fabrication is built of half-truths, with only certain events changed or exaggerated. In the case being considered, the victim attempted to withdraw her allegations against petitioner (R. 154). This desire to withdraw can be interpreted as an awareness that her story was not completely truthful. The victim's veracity was strongly called into question. This contradicts the Court of Military Appeals' finding that there were no grounds upon which to justify an order for a psychiatric evaluation. *United States v. Owen*, 24 M.J. at 396.

The Court had the authority to order an examination to test her ability to testify truthfully and should have done so. Although no statutory authority mandates compelled psychiatric examination, petitioner contends that military courts possess the inherent power to order soldiers to undergo psychiatric evaluations. Soldiers are routinely ordered to undergo psychiatric evaluations prior to certain types of administrative discharges. Army Reg. 636-200, *Enlisted Personnel-Separations*, Chapters 13-15 (5 July 1984).

Because a soldier is subject to orders to undergo psychiatric examination, it follows that a soldier who is a witness may be ordered to undergo an evaluation in the interests of justice.

II

PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS AND SIX AMENDMENT RIGHT TO CONFRONTATION WERE VIOLATED BY THE MILITARY JUDGE'S EXCLUSION OF EXTRINSIC EVIDENCE OF THE VICTIM'S PAST FALSE ACCUSATIONS.

Extrinsic evidence is permitted under Military Rule of Evidence 608(c)² which states:

Bias, prejudice, or any other motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

In this case, the military judge misperceived the thrust of petitioner's attack upon the credibility of the alleged victim. Extrinsic evidence was offered to show a pattern of making unfounded accusations. Instead, the military judge apparently interpreted the request as one to contradict the victim's testimony and refused to allow extrinsic evidence. *See* Mil. R. Evid. 608(a).

The military judge excluded extrinsic evidence concerning the incident involving CPT Lederle and the alleged victim. During cross-examination, PFC Petersen admitted that CPT Lederle had denied that any such encounter between the two of them had occurred. The military judge refused to allow extrinsic evidence to impeach PFC Petersen. He did allow the defense counsel to cross-examine the alleged victim about the incident with CPT Lederle thus establishing that CPT Lederle had denied the allegations and that the charges were dropped. However, this cross-examination could not ade-

² Mil. R. Evid. 608(a) and (b) are taken from the Federal Rules of Evidence. 608(c) is not found within the Federal Rules. However, it is consistent with federal case law. *Drafters' Analysis to Mil. R. Evid. 608*, Appendix 22, MCM 1984.

quately substitute for the actual testimony of CPT Lederle which would have been more persuasive to the members. Only PFC Petersen's story was told.

Although First Sergeant Higgins, who was falsely accused by PFC Petersen of fraternization, was allowed to testify concerning the incident, petitioner's defense counsel was prohibited from questioning the alleged victim concerning the incident in which an unknown black man was supposed to have verbally harassed her. As such, all of the evidence concerning the so-called victim's unfounded charges was never brought before the members, who might have assessed PFC Petersen's credibility quite differently had they been aware of her propensity for bringing false charges.

Private Petersen had, within a two or three-month period, accused at least three other men of unwanted or improper advances of an increasingly violent nature. Two were named, while one was unknown. The two known individuals were available for testimony. Their testimony was offered not to contradict PFC Petersen's version of events but to show she had established a pattern of misrepresenting or distorting her encounters with men over a two to three-month period (R. 58). This evidence constituted "hostility of emotion or partiality of mind of the witness from which the fact-finder can infer that the witness' testimony is distorted." *United States v. Banker*, 15 M.J. 207, 210 (CMA 1983), citing 3A Wigmore, Evidence § 940 (Chadbourn rev. 1970).

Private Petersen's motive for claiming unwanted attentions were being forced upon her may have been to portray herself as a victim, in order to engage the protective assistance of her boyfriend, SP4 Kilgore, who was at the time in the process of terminating their relationship (App. Exhs. VII, VIII). Extrinsic acts are admissible to show motive. Mil. R. Evid. 404(b).

In *Davis v. Alaska*, 415 U.S. 308 (1974) this Court held that it was a violation of petitioner's right of confrontation to not allow the defense to cross-examine a crucial prosecution witness about his juvenile record. In so holding, this Court stated:

The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yield-

ing of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.

. . . [T]he State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records.

Id. at 320.

Following *Davis*, the Court of Military Appeals held in *United States v. Dorsey*, 16 M.J. 1 (CMA 1983), that extrinsic evidence which is relevant, material, and vital to an accused's defense must be admitted. In *Dorsey* the court found that extrinsic evidence of the victim's sexual activity on the night of the rape in question was to have been committed should have been admitted when this evidence was offered to uphold appellant's contention that the victim had a motive for accusing him of rape, *i.e.*, she was incensed at the accused because he refused her sexual advances and in the process attacked her morals based on the facts that she was already married and had also had intercourse with another soldier earlier that evening. *Id.* at 2-3. The court saw the need in *Dorsey* to admit the evidence despite the strong policy favoring the exclusion of evidence of a rape victim's past sexual behavior. *See* Mil. R. Evid. 412. In the case *sub judice*, as in *Dorsey*, a motive was proffered and testimony on the defense theory offered, but extrinsic evidence was excluded. If the extrinsic evidence in *Dorsey* was ruled admissible, surely, the evidence in the present case should have been admitted, where the petitioner's theory of the alleged victim's motive for lying is far more credible. In *Dorsey*, the theory of the victim's motivation was based solely on the defendant's testimony, which indicated that the defendant had repeatedly within a short period of time changed his attitude about engaging in intercourse with the victim. 16 M.J. at 2-3. This case, like *Dorsey*, must be reversed.

"Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *United States v. Abel*, 469 U.S. 45, 52 (1984); *See also United States v. Hunter*,

21 M.J. 240, 242 (CMA 1986). The court in *Hunter* ruled that extrinsic evidence was properly excluded because the accused's theory of the witness's motivation to lie was too tenuous. As was stated earlier, the petitioner's theory in the present case is credible and deserving of at least a chance to be proven. Therefore, the Court of Military Appeals' position in the case *sub judice*, that it is difficult to find the relevance of the evidence, is unsupported. *United States v. Owen*, 24 M.J. 390, 393.

The defense desired to focus upon the untruthfulness of PFC Petersen's accusations. Evidence of false accusations is admissible on the issue of the victim's credibility. Extrinsic evidence was available to demonstrate both the alleged victim's motive to make false accusations and to establish a pattern of her making such accusations. Also, evidence was available to prove the accusations false. The alleged victim admitted the untruthfulness of the fraternization charge when she was confronted by her First Sergeant (R. 153). The charge against CPT Lederle was dropped after a formal investigation into PFC Petersen's accusations. Also, nothing came of the allegations against the so-called unknown black soldier, as no one could be identified.

The description of the encounter between CPT Lederle and PFC Petersen is similar to the one in issue. In the former, a date is made using a ruse. The victim goes willingly, not perceiving any sinister motive. She is driven off to a remote location where unwanted advances are made. The advances rebuffed, PFC Petersen is driven back to her barracks (R. 113). The major difference between the two incidents is that CPT Lederle's denial was believed, while petitioner's was not. The fact that the charges are more serious in petitioner's case does not change the basic similarities in both situations.

The court members might have assessed PFC Petersen's credibility quite differently had they been aware of the full extent of her propensity for bringing unfounded charges. As such, the excluded evidence was crucial to petitioner's defense, and not collateral to the issue of guilt or innocence as the Court of Military Appeals ruled. *United States v. Owen*, 24 M.J. at 393. Accordingly, it is admissible under Mil. R. Evid. 403.

CONCLUSION

Failure to order the alleged victim to undergo a psychiatric evaluation and failure to allow petitioner to introduce evidence of the victim's past unfounded accusations undermined petitioner's ability to adequately defend himself.

Respectfully submitted,

JOHN T. EDWARDS
Colonel, Judge Advocate
General's Corps (JAGC)
United States Army
5611 Columbia Pike
Falls Church, Virginia 22041,
(202) 756-1807
Counsel of Record
and

JOEL D. MILLER
Lieutenant Colonel, JAGC
United States Army

DONALD G. CURRY, JR.
Captain, JAGC
United States Army

SCOTT A. HANCOCK
Captain, JAGC
United States Army

JOHN J. RYAN
Captain, JAGC
United States Army

APPENDICES



UNITED STATES COURT OF MILITARY APPEALS

No. 53,607.

CM 446261.

UNITED STATES, APPELLEE,

v.

WILLIAM B. OWEN, SPECIALIST FOUR U.S. ARMY,

APPELLANT

Aug. 31, 1987

For Appellant: *Captain John J. Ryan* (argued); *Colonel Brooks B. La Grua*, *Lieutenant Colonel Arthur L. Hunt*, *Major Jerry W. Peace* (on brief).

For Appellee: *Captain Samuel J. Rob* (argued); *Colonel James Kucera*, *Lieutenant Colonel Adrian J. Gravelle*, *Lieutenant Colonel Gary F. Roberson* (on brief); *Colonel Norman G. Cooper*.

Opinion of the Court

COX, Judge:

Appellant was tried by general court-martial composed of officer and enlisted members on charges alleging assault with intent to commit rape and forceful sodomy. Contrary to his pleas, he was convicted of indecent assault and forceful sodomy, in violation of Articles 134 and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 934 and 925, respectively. He was sentenced to a bad-conduct discharge and reduction to the lowest enlisted grade. The sentence was approved by the convening authority, and the findings and sentence were affirmed by the Court of Military Review. We granted review of the following issues:

I.

WHETHER THE MILITARY JUDGE ERRED BY EXCLUDING EXTRINSIC EVIDENCE OF THE VICTIM'S PAST FALSE ACCUSATIONS.

II

WHETHER THE COURT ERRED IN HOLDING IT LACKED DISCRETION TO ORDER A PSYCHIATRIC EXAMINATION OF THE ALLEGED VICTIM.

Issue I is premised on the defense theory that the complainant, Private Petersen, either intentionally lied about the offenses with which appellant had been charged and convicted or she suffered some psychological problem which impelled her to fabricate stories of romantic/sexual overtures made towards her by men. The latter stems from the fact that Private Petersen had, on at least three previous occasions, either made or had been involved in such complaints against members of the opposite sex. While these incidents were never totally substantiated, they also were never proven false. Indeed, in one instance involving a commissioned officer, corroboration was received of an association between Petersen and the officer from another individual who had seen the two "fraternizing" during off-duty hours.

Trial counsel moved *in limine* to prohibit the defense from calling the officer in question as a witness.¹ Defense counsel contended that the officer's testimony was important to challenge Private Petersen's credibility and, thus, the veracity of the charges against appellant. The judge ruled against calling the officer and precluded any reference to a report Private Petersen had made to military police concerning an incident with the unidentified black male. However, without objection from the Government, defense counsel was permitted to call to the stand Master Sergeant Higgins, who had been Petersen's first sergeant about 1 year before the date of trial and whose testimony concerned allegations of misconduct made against him by Petersen.

Private Petersen was cross-examined about the incidents involving Sergeant Higgins and the officer. Consequently, the only evidence not admitted and, hence, still in issue is the officer's testimony and the military police report pertaining to the unidentified black male.

¹ See *United States v. Rivera*, 24 M.J. 156, 159 (C.M.A. 1987), for my views on the prosecution's use of "preemptive strikes."

At trial, both appellant and Private Petersen testified about what happened on October 9, 1983. However, their respective accounts differed greatly. In essence, what started out as a friendly ride in the country turned into a series of events which ultimately resulted in the charges against appellant.

Mil.R.Evid. 608(b), Manual for Courts-Martial, United States, 1969 (Revised edition), provides:

Specific instances of conduct. Specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning character of the witness for truthfulness or untruthfulness.

(Emphasis added.)

On the other hand, Mil.R.Evid. 608(c) provides:

Evidence of bias. Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

(Emphasis added.) The drafters of the rule make it plain "that extrinsic evidence may be used to show" "this form of impeachment." Drafter's analysis, page A18-88, Manual, *supra*. Apparently "evidence otherwise adduced" was consciously intended to include extrinsic evidence. Finally, Mil.R.Evid. 404(b) permits use of "[e]vidence of other . . . acts . . . for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Our first question here is, what purpose would have been served by admitting the officer's testimony or the military police report? Looking at the record, it is difficult to determine what defense counsel had in mind. Without invoking any specific rule of evidence, counsel made these various arguments:

[I]t's obviously relevant that she has made complaints before. Apparently anybody who attempts to go out with

her or do something with her they wind up in court or with a complaint against them.

* * * * *

[T]he fact that she has made allegations in this realm before I think it's significant.

* * * * *

He [the officer] said that he was at home that night, he wasn't there at all. So, for impeachment, if nothing else. Though "the substance of the evidence" seems to have been clear enough, its relevance was less so. *See* Mil.R.Evid. 103(a)(2) and 401-04.

In the first place, the defense hoped to buttress its basic theory by establishing that, because Petersen had made *false* accusations against other men, she was capable of making false accusations against appellant. The significance of these prior complaints, then, depended on showing that they were indeed false—a proposition far from established, in our estimation, even through proffer.

Assuming, *arguendo*, that some inference of falsity in these complaints was raised (apparently in that they did not culminate in successful prosecutions), what did it prove? Our review of the record suggests at least two possibilities.

(1) That the evidence was offered to show that Petersen was not worthy of belief. If so, the judge acted correctly in excluding it. Mil.R.Evid. 608(b).

(2) That the evidence was offered to show Petersen's general bias or motive to misrepresent (no hint of such theory was voiced by the defense). If this is the case, under Mil.R.Evid. 404(b) or 608(c), the evidence might have been admissible.² *See United States v. Banker*, 15 M.J. 207, 212

² To a considerable extent, Mil.R.Evid. 608(c) appears to swallow Mil.R.Evid. 608(b). If extrinsic evidence of conduct is offered to attack the *credibility* of a witness, it is ostensibly inadmissible under 608(b). However, if the same extrinsic evidence is offered to show that the witness is *biased*, etc., it is admissible under 608(c). And to complete the loop, showing bias is one of the chief ways in which to attack a witness' credibility. Presumably, the same result obtains under Mil.R.Evid. 404(b) if the other conduct is probative of motive. *United States v. Saipaia*, 24 M.J. 172 (C.M.A. 1987).

(C.M.A. 1983); Drafters' Analysis, page A18-88, Manual, *supra*; S. Salzburg, L. Schnasi, and D. Schlueter, *Military Rules of Evidence Manual* (hereinafter Salzburg) 519-20 (1986).

However, even if the evidence had been relevant under Mil.R.Evid. 404(b) or 608(c), the military judge was correct in excluding it as being too collateral under Mil.R.Evid. 403, which provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

As trial counsel aptly pointed out, if the officer had testified, his testimony would have amounted to a pointless diversion and established nothing. Instead, there would have been "a small trial within a trial," and the military judge was correct in cutting off this tangent. *See* Salzburg, *supra* at 518 ("The drafters were concerned that the introduction of extrinsic evidence would cause confusion and tend to distract the court members.").

In any event, Petersen testified on cross-examination that her roommate actually made the complaint against the officer; that an investigation had been conducted; and that the brigade commander "had just said that he was going to drop the charges and put it away in the files and we were all going to forget about it." No conceivable prejudice accrued to appellant from the absence of the officer's testimony.

The military judge also was correct when he ruled against admission of the report filed by Petersen with the military police about the unidentified black male on the grounds of irrelevance. Even defense counsel conceded: "I don't think that there is any way to verify whether it was false or not, Your Honor."

Issue II

During an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, the defense moved to have Private Petersen examined by a

psychiatrist, contending that she had a history of "extensive antisocial and unusual behavior patterns," that these prior complaints were all "unfounded," and that they evidenced a "pronounced" pattern of "severe psychiatric problems." Defense counsel sought to prove this allegedly bizarre behavior through cross-examination of complainant and introduction of extrinsic evidence of the prior incidents.

The military judge initially questioned his own authority to order an individual to undergo a psychiatric examination, but he did not decide the motion on the basis that he lacked authority. Instead, he stated that "[a]t this point, I see nothing that requires me to take the extraordinary measure to compel a psychiatric examination. So, at this time, the motion is denied."

Whether a military judge can order the alleged victim to undergo a psychiatric examination in a sexual assault/abuse case is a novel question and is not one that is easily resolved.³ Positions have been taken at both extremes of the question. Wigmore contends that "[n]o judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician."⁴ However, this statement has been criticized and rejected. The notion that psychiatric "examinations should be routinely ordered in rape cases, [citation omitted] . . . is based on outmoded notions of the instability and duplicity of women in general and, as such, should be discarded altogether." *State v. Romero*, 94 N.M. 22, 606 P.2d 1116, 1121 (1980); see also *People v. Souvenir*, 83 Misc. 2d 1038, 373 N.Y.S.2d 824 (N.Y. Crim.Ct. 1975). The vast majority of jurisdictions have adopted the more pragmatic rule "that the decision to order . . . [a psychiatric] examination [of the complainant-witness] is 'entrusted to the sound discretion of the trial judge in light of the particular facts.'" *United States v. Riley*, 657 F.2d 1377, 1387

³ See Annot., 18 A.L.R.3d 1433 (1968).

⁴ 3A J. Wigmore, Evidence § 924a at 737 (Chadbourn rev. 1970) (citing, *inter alia*, *Ballard v. Superior Court*, 64 Cal.2d 159, 49 Cal.Rptr. 302, 410 P.2d 838 (Cal. 1966), for a full discussion of the quoted language).

(8th Cir. 1981), quoting *Government of the Virgin Islands v. Scuito*, 623 F.2d 869, 875 (3d Cir. 1980), and *United States v. Benn*, 476 F.2d 1127, 1131 (D.C. Cir. 1972); see also Annot. 18 A.L.R. 3d 1433 (1968).

We reject Wigmore's suggestion and, instead, agree with many other jurisdictions that the rule is "completely unrealistic and unsound." *State v. Looney*, 294 N.C. 1, 240 S.E.2d 612, 622 (1978). See also *United States v. Been*, *supra* at 1131, where it states:

[A]ny such rigid rule is precluded by countervailing considerations. For example, a psychiatric examination may seriously impinge on a witness' right to privacy; the trauma that attends the role of complainant to the sex offense charges is sharply increased by the indignity of a psychiatric examination; the examination itself could serve as a tool of harassment; and the impact of all these considerations may well deter the victim of such a crime from lodging any complaint at all.

Indeed, the rationale behind the adoption of Mil.R.Evid. 412 was "to exclusively control the use of character and conduct evidence of the victim in sexual offense prosecutions." The rule was designed to curtail abuse of witnesses. *Salzburg*, *supra* at 402-03.

The matter is further complicated in the military by practical problems of implementing a decision to compel the psychiatric examination of a complainant-witness. Article 47, UCMJ, 10 U.S.C. § 847, provides a procedure for prosecuting a civilian/nonmilitary person who refuses or fails to appear as a witness, but it is silent as to the refusal of a witness to submit to a physical or psychiatric examination. *Cf. United States v. Hinton*, 21 M.J. 267 (C.M.A. 1986). Article 48, UCMJ, 10 U.S.C. § 848, provides for contempt powers, but they are limited to misdeeds such as menacing words, signs or gestures, or disturbance of the proceedings.

If the victim is a servicemember, as here, the situation may be somewhat different. However, the examination of soldiers or their dependents for psychiatric disorders is governed by Army Regulation 600-20, which establishes rigid standards to be followed for examinations conducted against the will of

the patient. Paragraph 5-25 sets out the circumstances under which servicemembers can be compelled to undergo examinations. Paragraph 5-26 prescribes elaborate procedures for protecting the servicemember who is to be compelled to be examined against his or her will. Importantly, paragraph 5-25b provides:

Nothing in this section limits the authority of appropriate officials to order the performance of medical procedures for the purpose of obtaining evidence without the consent of the individual concerned, and without board action under paragraph 5-30, in cases *where such are authorized under other regulations or the Military Rules of Evidence, Manual for Courts-Martial*.

(Emphasis added.)

No such authorization is cited for compelling victims/witnesses to undergo psychological examinations in sex cases. Without statutory or regulatory authority, it is doubtful that either a civilian or military physician would examine a patient without the patient's consent. We are therefore convinced that the military judge does not have the "inherent power" to compel a victim/witness to undergo a nonconsensual psychiatric or physical examination, and we do not distinguish between male and female victims in so holding.

That does not mean, however, that the military judge is without leverage to protect an accused against the concerns that Wigmore⁵ describes as

the behavior of errant young girls and women [or boys and men as we have seen in various forms in courts-martial] coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by the complexes is that of contriving false charges of sexual offenses by men.

We might suggest several ways in which a military judge might protect the interests of an accused, and the list is by no means exclusive.

⁵ Wigmore, *supra*, at 736.

First, the judge can use the persuasive powers of his office and that of the trial counsel to secure the witness' consent. It is a delicate matter to be sure, but the witness may well consent if he or she is convinced that the judge is seeking to do justice and not to embarrass or harass him or her.

Second, a well-prepared defense counsel can often develop sufficient information based upon cross-examination and extrinsic evidence to obtain the opinion of an expert psychiatrist. Mil.R.Evid. 702-706 certainly envision such testimony in the appropriate case. Mil.R.Evid. 412 gives the military judge sufficient latitude to permit proof of the behavior giving rise to the expert opinion. *E.g.*, *United States v. Colon-Angueira*, 16 M.J. 20 (C.M.A. 1983); *United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983).

Third, in extreme cases the judge could strike the witness' testimony, particularly where there is absolutely nothing to corroborate the allegations.

Therefore, in that unique case where the military judge is convinced that justice cannot be served without a full exploration of the psychological make-up of the complaining witness, he has the inherent power to vindicate the rights of the accused. *See United States v. Zayas*, 24 M.J. 132, 137 (C.M.A. 1987) (Cox, J., dissenting on other grounds); *United States v. Eshalomi*, 23 M.J. 12, 28 (C.M.A. 1986) (Cox, J., concurring). We repose faith and trust that military judges will carry out their duty in this regard:

[I]mplicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task. . . . [A]nd . . . it must be assumed that the military court system will vindicate servicemen's constitutional rights.

Schlesinger v. Councilman, 420 U.S. 738, 758, 95 S.Ct. 1300, 1313, 43 L.Ed.2d 591 (1975).

Turning to the facts of this case, the military judge correctly concluded that he would not order the complaining victim to undergo a psychiatric examination.⁶ Further, the facts

⁶ Chief Judge Everett would authorize the military judge "to direct the physical or psychiatric examination of an alleged victim," 24 M.J. at 396.

and circumstances presented to the military judge clearly reflect that the victim had no history of psychiatric problems, and no such examination had ever been performed. The judge also made an affirmative finding, which is supported by the record, that, even assuming he possessed the power to order an individual to undergo a psychiatric examination, the facts and circumstances of this case did not warrant such action. We agree and find no error prejudicial to the rights of the accused.

The decision of the United States Army Court of Military Review is affirmed.

SULLIVAN, Judge (concurring):

I agree with Judge Cox except to the extent that his opinion might be construed as undermining the decision of this Court in *United States v. Zayas*, 24 M.J. 132 (C.M.A. 1987).

EVERETT, Chief Judge (concurring in the result):

In my view, a military judge has inherent authority to direct the physical or psychiatric examination of an alleged victim, if the judge concludes that this is required by the interests of justice. The judge's order for the examination provides an adequate basis for military authorities to perform it themselves or to have the examination performed by civilian doctors. If the alleged victim declines to submit to the examination or to cooperative therein, then the military judges may allow cross-examination of the alleged victim or defense comment in regard thereto; or he may simply refuse to let the witness testify.

I concur in the result here because the military judge stated that, even if he possessed the power to order a psychiatric examination, he did not find such action to be warranted in the present case.

and I am sympathetic to that view. But he provides no legal vehicle for the judge to enforce his order. Indeed, he finally reaches the same result I do, that the ultimate remedy is to refuse to let the witness testify. The reason I don't call this "inherent power" to compel a witness to undergo an examination is that, unless one has the ability to enforce his orders by requiring compliance therewith, then what he is doing is something less than issuing an order. I choose to call that "leverage."

UNITED STATES ARMY COURT OF
MILITARY REVIEW

Before
COMEAU, WATKINS, and LYMBURNER
Appellate Military Judges

CM 446261

UNITED STATES, APPELLEE,

v.

SPECIALIST FOUR WILLIAM B. OWEN, 289-72-8747,
UNITED STATES ARMY, APPELLANT

For Appellant: Lieutenant Colonel William P. Heaston,
JAGC, Captain Donna Chapin Maizel, JAGC (on brief).

For Appellee: Colonel James Kucera, JAGC, Lieutenant Col-
onel Adrian J. Gravelle, JAGC, Lieutenant Colonel Thomas
M. Curtis, JAGC, Captain Samuel J. Rob, JAGC (on brief).

US Army Air Defense Artillery Center
and Fort Bliss

J. G. Garner, Military Judge

30 August 1985

DECISION

Per Curiam:

On consideration of the entire record, including considera-
tion of the issue personally specified by the Appellant, we

hold the findings of guilty and sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are **AFFIRMED**.

FOR THE COURT

/s/ WILLIAM S. FULTON, JR.

William S. Fulton, Jr.

Clerk of Court

